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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 271

CHARLES H. ALBERS, AS RECEIVER OF WOODLAWN TRUST AND SAVINGS BANK, A CORPORATION,

Petitioner,

vs.

JAMES A. FARLEY, HENRY MORGENTHAU, JR., AND ROBERT H. JACKSON, AS TRUSTEES OF THE POSTAL SAVINGS SYSTEM; WILLIAM A. JULIAN, AS TREASURER OF THE UNITED STATES OF AMERICA AND WILLIAM A. JULIAN, AS TREASURER OF THE BOARD OF TRUSTEES OF THE POSTAL SAVINGS SYSTEM,

Respondents.

Reply Brief for Petitioner.

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Reply Brief for Petitioner.

The respondents have filed a brief in opposition in which it is urged that the petition for certiorari should be denied because there is no conflict in decisions and the decision of the court below is correct. Although we believe that substantially all of the points raised by the respondents were covered in the petition for certiorari and brief in support thereof, it is desired to specifically reply to certain of the respondents' arguments.

ARGUMENT.

I.

The respondents contend that the decision of the Court of Claims of the United States in *Annie Leka, Administratrix of the Estate of Mike Mesich* v. *The United States*, 69 Court of Claims Reports 79, is not in conflict with the decision of the court below (Brief, pp. 7-10). As one ground for this position, the respondents urge (Brief, p. 9) that the court below did not mean what it said in the following paragraph of its opinion:

> "The fund in the present case originated *in the deposit with the United States* by its owners of money, subject to withdrawal in all material respects as though it were deposited in a bank. When received, it was in due time *deposited by the United States* for safekeeping in a bank, and security was taken for its repayment, all in accordance with the congressional mandate. * * * The credit of the United States was pledged for its repayment. This, at the very least, created as between depositor and government *the relationship of debtor and creditor*, and gave the United States full control of and full responsibility for its disposition. * * *" (R. 118-119.) (Italics ours.)

If this were true then certainly the depositor of money in a Postal Savings depository could maintain an action in the Court of Claims to recover his deposits, which the Court of Claims in the *Leka* case held could not be maintained by a depositor because the debt due on the deposit was not a liability of the United States payable out of its funds, but was payable out of the funds in the hands of the

trustees of the Postal Savings System. (See p. 8 of Respondents' Brief.)

The court below certainly must have meant what it said for the above quoted paragraph was the only basis of the decision. This is made clear by the statements which directly follow the portion of the opinion quoted above, viz.:

> "* * * To say, in these circumstances, that a suit—the result of which will be to cut the fund in half—may be prosecuted without the United States as necessary parties, would be going too far. In exacting the pledge under which the bonds were delivered, appellants acted in accordance with the statute. If the pledge was illegal, it was nevertheless a pledge *given to the United States* to secure deposits of money *for which the government was responsible.* * * *" (R. 119.) (Italics ours.)

On the contrary the Court of Claims in the *Leka* case said at page 87 of 69 Court of Claims Reports:

> "Before passing to a discussion of the regulations promulgated by the board of trustees to effectuate the purposes enumerated, it may be well to pause here and note that there was created by this act *a trust with named trustees,* the deposits to be held as trust funds and to be held within the State or community where the deposit was made, and the withdrawals or repayments to be made at the place of deposit and from deposits within the State or community. Interest was to be paid on the deposits, and as provided in the act interest was collected from the banks on the deposits held by them. *No part of the fund, it will be observed, went into the Treasury of the United States or became the property of the United States. It was held in trust separate and apart from the funds of the Government.* Such being the case the Secretary

of the Treasury has no fund out of which to pay the judgment of this court, as it is not payable out of any Government funds. *The debt due on this deposit is not a liability of the United States payable out of its funds. It is payable out of the funds in the hands of the trustees, namely, the funds deposited under the postal savings system, and such regulations as they had promulgated as to withdrawals and conditions of payment.*" (Italics ours.)

This, we believe, shows a direct conflict between the two decisions and certainly the language of the court below is clear and unambiguous in declaring (R. 118) that "This, at the very least, created as between depositor and government the relationship of debtor and creditor, * * *."

The Court of Appeals held in the case at bar that the pledge under which the bonds were delivered, even though illegal, was nevertheless a pledge given to the United States (R. 119). We believe that the record is clear that the pledge was not given to the United States.

The Treasurer of the United States is, by the Act of Congress creating the Postal Savings System, constituted the Treasurer of the Board of Trustees. (Sec. 759, Title 39, U. S. Code.) The assets delivered to him by the Woodlawn Bank were delivered to him merely as pledgee and not to be covered into the United States Treasury as property belonging to the United States or to be disbursed in accordance with any Act of Congress. He recognized the capacity in which he received those assets by issuing receipts therefor, which recited that he received them "in trust for this bank," meaning in trust for the Woodlawn Bank (R. 26, Add. R. 18). This suit against the Treasurer of the United States was, therefore, not one to recover funds or property of the United States in his hands, but was a suit to recover from him property which had

been illegally pledged with him and which he holds as pledgee in trust for the Woodlawn Bank to secure deposits to the credit of the Trustees—not deposits to the credit of the United States—in the Woodlawn Bank, and which, because of such illegal pledging, it is his duty to return to the receiver of the Woodlawn Bank.

In fact, under the decision of the Court of Claims in the *Leka* case, and as shown by the provisions of the Postal Savings Act, the monies deposited in the Woodlawn Bank were not funds of the United States and the bonds were accordingly not pledged to secure funds of the United States. The funds deposited in the Woodlawn Bank were the funds of the depositors in the Postal Savings System which were held in trust by the trustees of the Postal Savings System.

With respect to the responsibility of the United States, the decision of the court below is again in conflict with the decision of the Court of Claims in the *Leka* case in which the Court of Claims said:

> "While the act contained the following provision:
>
> " 'That the faith of the United States is solemnly pledged to the payment of the deposits made in postal savings depository offices, with accrued interest thereon, as herein provided,'
>
> "this clearly means that the faith of the United States is pledged to make good any deficiency in case there is a deficiency in the funds; but this does not mean that the United States can be sued by one of the depositors where there is no question about there being sufficient funds on deposit to meet the claim. The United States has nowhere in this act provided for a suit against it or consented to be sued. We might stop here with the conclusion that this court has not judicial power to give judgment. *The contract in-*

volved is not with the United States. It is a contract providing that the depositor is to be paid out of the funds deposited under the postal saving system, and the act itself and the regulations promulgated in pursuance thereof are written into and became a part of the contract. Under the regulations the money received was deposited to the credit of the board of trustees. (See Finding IX.) The checks and drafts for payment were drawn against this account of the board of trustees." (Italics ours.)

Even though an obligation of the United States to make good any deficiency in the funds of the Postal Savings System to meet the obligations incurred by the Trustees in the operation of the System might arise by reason of the return to the receiver of the Woodlawn Bank of the assets which were illegally pledged to secure deposits of Postal Savings funds in that bank and the repayment of the monies credited to the Trustees on account of principal and interest received by the Treasurer from pledged assets, still that would not make a suit by the receiver of the bank against the Trustees and the Treasurer to recover the illegally pledged assets and the monies received from pledged assets, a suit in essence one against the United States or require that the United States be made a party to that suit.

Neither the pledged assets nor the proceeds of the pledged assets belong to the United States and have not been covered into the Treasury, nor is there any law under which they can be so covered as funds of the United States. The securities which the Treasurer has are assets of the bank out of which all creditors are entitled to be paid ratably. The only question is whether there was a valid authorization of the pledge. If there was not, the Treasurer must restore the pledged assets to the receiver of the Woodlawn Bank, and the Trustees must refund the proceeds

from the illegally pledged assets which have been credited to their account by the Treasurer.

The respondents say that the court below considered the Postal Savings System a part of the United States Government and had no distinction in mind between the system and the government proper (Brief, p. 9).

If this be so a definite conflict is created because the Court of Claims held in the *Leka* case that the deposit of funds by a depositor in a postal savings depository *does not* confer ownership of the deposited funds upon the United States and does not create a liability of the United States which can be enforced against the United States.

Moreover, the brief of respondents (p. 9) admits the distinction between the Postal Savings System funds and funds of the United States by saying "It was, of course, the Postal Savings System with which the money was deposited and which in turn deposited it in a bank," and that "the opinion shows that the court did not mean to say that the United States as distinguished from its instrumentality, the Postal Savings System, was the debtor of the depositor and had control of and responsibility for the disposition of the deposit."

It would appear from this passage in the respondents' brief that they not only admit the distinction between postal savings funds and funds of the United States but also assert and urge that the court below did not mean to say that the United States as distinguished from the trustees of the Postal Savings System were responsible for the disposition of postal savings funds.

As is shown in our brief in support of the petition (pp. 33-37) the fact that the Postal Savings System is an instrumentality of the United States does not prevent a suit against the trustees of the Postal Savings System nor render the United States an indispensable party to a suit

brought against the trustees. This point will be further discussed herein in answer to respondents' argument (Brief, p. 11) that the United States is a necessary party to the suit on the theory that the Postal Savings System is a government instrumentality.

II.

The respondents contend (Brief, p. 10) that "the quotations from the opinion below and from the *Leka* opinion upon which petitioner relies as establishing a conflict are but *dicta.*"

We have hereinbefore quoted from the opinions in the two cases, and it is respectfully submitted that the opposite conclusions reached by the two courts do not constitute *dicta* but are the very bases of their respective decisions. Under the decision of the Court of Claims in the *Leka* case the deposit of funds by a depositor in a postal savings depository office does not confer ownership of these funds upon the United States nor create a liability of the United States which can be enforced against it in the Court of Claims. On the other hand the court below held that these same funds were deposited with the United States; that a *debtor and creditor relationship* was established between the United States and the depositor (R. 118).

If the funds were not funds of the United States, as held in the *Leka* case, the deposit of these same funds by a postmaster in the Woodlawn Bank could not create a debt due from that bank to the United States.

On page 10 of respondents' brief it is said that the court below held that the United States was an indispensable party because the suit sought to establish title to property in which the United States had an interest. The United States could not legally have or claim any interest in

property which admittedly had been illegally pledged to secure deposits of Postal Savings funds. Those securities necessarily belonged to the receiver.

III.

The respondents urge (Brief, p. 11) that the decision of the court below is not in conflict with the decisions of this Court and other courts discussed at pages 12 to 20, inclusive, of the petition for certiorari under Points IV and V of the reasons for granting the petition. The cases were cited on the question whether the United States are necessary and indispensable parties to a suit brought against an instrumentality of the United States or an officer of the United States or an entity holding property in which the United States has an interest.

The respondents refer (Brief, p. 11) to the following cases cited by the petitioner: *United States Bank* v. *Planters' Bank*, 9 Wheat. 904; *National Bank* v. *Commonwealth*, 9 Wall. 353; *Davis* v. *Elmira Savings Bank*, 161 U. S. 275; *Sloan Shipyards* v. *United States Fleet Corporation*, 258 U. S. 549; *Merchants Fleet Corporation* v. *Harwood*, 281 U. S. 519; and *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381.

The respondents then say:

> "In such cases the question is whether Congress intended that the instrumentality should enjoy the Government's immunity, and the intention, if not expressed, is to be determined by consideration of various relevant circumstances. In the case at bar there is no express congressional consent to suit against the trustees, and petitioner does not point to any circumstance from which an implied consent is to be inferred."

We respectfully submit that no express or implied Congressional consent is required for suit against the trustees of the Postal Savings System, because the suit is against individuals, as trustees, and not against a corporation, and no specific authority is required to sue individuals as in the case of corporations; and even where the suit is against a corporation created by Congress, and no provision is made for suit against such corporation, it was held that the corporation was not immune from such suit on the ground that it was an instrumentality of the Federal Government. *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381. We think that the decision of this Court in *Sloan Shipyards* v. *United States Fleet Corporation, supra,* is a complete answer to the respondents' argument on the question of express or implied consent. In that case this Court declared (pp. 566-567 of 258 U. S.):

> "The sovereign properly so called is superior to suit for reasons that often have been explained. But the general rule is that *any person* within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law that exonerates him. Supposing the powers of the Fleet Corporation to have been given to *a single man* we doubt if anyone would contend that the acts of Congress and the delegations of authority from the President left him any less liable than other grantees of the power of eminent domain to be called upon to defend himself in court. *An instrumentality of government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts. Osborn* v. *Bank of United States,* 9 Wheat. 738, 842, 843; *United States* v. *Lee,* 106 U. S. 196, 213, 221. The opposite notion left some traces in the law, 1 Roll. Abr. 95, Action sur Case, T., but for the most part long has disappeared.

> "If what we have said is correct it cannot matter that the agent is a corporation rather than a single man. The meaning of incorporation is that you have a person, and as a person one that presumably is subject to the general rules of law." (Italics ours.)

We think that the words of the Court in that case certainly apply to a suit against the Trustees of the Postal Savings System. Instead of creating a corporation, the Act of Congress created a board of trustees, consisting of persons, who under established rules of law are answerable for their wrongful acts, and who can under those established rules be sued in their capacity as trustees without any express or implied power as in the case of corporations.

With respect to *Osborn* v. *Bank of United States,* 9 Wheat. 738, and *Davis* v. *Gray,* 16 Wall. 203, the respondents urge that the rule of these cases has long been discarded (Brief, p. 11). In *Osborn* v. *Bank of United States, supra,* at page 870 the Court said:

> "Where the right is in the plaintiff, and the possession in the defendant, the inquiry cannot be stopped by the mere assertion of title in a sovereign. The Court must proceed to investigate the assertion, and examine the title."

In the decision of this Court in *Sloan Shipyards* v. *United States Fleet Corporation, supra* (pp. 566-567), *Osborn* v. *United States, supra,* was cited with approval.

This Court also cited *Davis* v. *Gray, supra,* and quoted from the decision in that case with approval in *United States* v. *Lee,* 106 U. S. 196 at pages 207-208. We cannot find any decision discarding the rule of these cases and the respondents have not cited in their brief any case or cases which overrule them.

Finally the respondents state (Brief, p. 12):

> "* * * it is well settled that a suit against an official of the United States to litigate title to property held by the official for the United States—and that is what, in essence, the present action is—is a suit against the United States, and cannot be maintained."

This statement is also made in Note 3, page 5 of respondents' brief and cases are cited in support of the proposition. However, neither the proposition of law, as stated by the respondents, nor the cases cited are in point here for, as developed hereinbefore in this brief and in the petition for certiorari, neither the postal savings funds nor the bonds here involved are held in trust by the trustees of the Postal Savings System for the United States.

The postal savings funds are held in trust separate and apart from the funds of the United States for the benefit not of the United States but for the depositors in the Postal Savings System. *Annie Leka, Administratrix* v. *United States, supra.* The bonds are held by the Treasurer of the United States (who is ex-officio treasurer of the board of trustees of the Postal Savings System) as pledgee in trust for the Woodlawn Bank to secure deposits to the credit of the trustees of the Postal Savings System (not deposits to the credit of the United States). As developed in the petition for certiorari and as held by the court below, the pledge was illegal and it is the duty of the Treasurer of the United States to return the bonds to the petitioner herein as receiver of the Woodlawn Bank.

In attempting to destroy the effect of the holdings in *United States* v. *Lee,* 106 U. S. 196, and *Tindal* v. *Wesley,* 167 U. S. 204, respondents say that they were ejectment actions against officials and were maintainable against the officials in their individual capacities because an ejectment action does not litigate the title but only the right to possession of the defendant. Just what effect that distinction has, if there is any such distinction, is not shown.

However, it may be noted that in *Marshall* v. *Ladd*, 131 U. S. (appendix) lxxxix (19 L. Ed. 153) this Court said:

> "It is of the essence of the action of ejectment that the legal title must prevail, * * *."

Likewise, in *McGuire* v. *Blount*, 199 U. S. 142, this Court said (p. 144):

> "It is elementary law that the plaintiff in ejectment must recover upon the strength of his own title, * * *."

However, in this case the title of the plaintiff to the securities sought to be recovered is not and cannot be questioned. It is conclusively shown and is conceded by the respondents that petitioner has title to the securities sought to be recovered, and respondents do not claim that the United States have title to those securities, but merely claim that the United States have an interest in the securities by virtue of a pledge which respondents admit was illegal and void and of no force and effect and which therefore could not form any basis for a claim by the United States, to those securities.

CONCLUSION.

It is therefore respectfully submitted that the United States Court of Appeals for the District of Columbia erred in deciding that the United States were necessary and indispensable parties to this suit and that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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